

MERIT SYSTEMS PROTECTION BOARD

20

**Annual
Report**



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U.S. Merit Systems Protection Board



**Annual Report
Fiscal Year 2002**

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Fiscal Year 2002 in Review

SEPTEMBER 11TH AND ANTHRAX – DEALING WITH THE AFTERMATH

The Merit Systems Protection Board began Fiscal Year (FY) 2002 as it ended FY 2001, still dealing with the aftermath of the September 11th attacks on the World Trade Center and Pentagon and the anthrax-by-mail incidents. Shortly after the September 11th attacks, the Board announced variations from its normal case procedures to ensure that no party's rights in an MSPB proceeding would be adversely affected by the events of that day. The announced variations applied both to cases processed in the Board's New York Field Office and to filings due to any of its offices that were affected by office closures, communications failures, or mail disruptions.

The New York Field Office, located just a few blocks from the World Trade Center, was evacuated following the September 11th attack and remained closed until late October. The Board's headquarters in Washington closed soon after the attack on the Pentagon, and other MSPB offices throughout the country closed early that day. Telephone service was disrupted in New York, circuits were overloaded in Washington, and mail pickup and delivery were affected throughout the country. Each of these factors impacted the daily sending and receiving of documents in the process of adjudicating cases both at Board headquarters and in the regional and field offices.

During the time the New York Field Office was closed, all filings due to that office were made instead with the Northeastern Regional Office in Philadelphia, and that office assisted parties to cases pending in the New York office. Administrative judges in all of the regional and field offices were authorized to exercise discretion in accepting filings due on September 11th that were made after that date. At headquarters, the Clerk of the Board was authorized to exercise similar discretion with respect to filings made there. Where an agency's case files were destroyed in the attacks—as was the case with several Federal agencies in the World Trade Center—appropriate continuances were granted until the case files could be reconstructed, and MSPB offices assisted in the reconstruction of such files.

Just a few weeks after the September 11th attacks, the Board was presented with another challenge to its case processing when anthrax-contaminated mail was discovered in Washington. With the sudden closure of Washington's main mail sorting facility, and the decision to delay delivery of mail to Federal agencies until after it was treated, the Board's headquarters had no incoming mail for the next month. Even after mail delivery was resumed, only a few filings were received each day. The Board's ability to send case documents from its offices was also affected because, even after mail delivery to Federal agencies resumed, several agencies advised the Board that they would no longer accept documents sent by

mail and asked that they be sent by facsimile or e-mail instead.

The Board announced the variations from its normal procedures after the September 11th attacks through a press release, a notice on the MSPB website, and a notice published in the *Federal Register*. Updates on the operating status of the New York Field Office were posted to the website on a regular basis. Following the anthrax incidents, the Board posted a notice to its website advising parties of the status of mail delivery to MSPB headquarters and encouraging them to make filings by facsimile or commercial overnight delivery where possible. The notice also advised parties that if they did not receive an acknowledgment of a filing by mail within three weeks to call the MSPB office with which the filing was made. Numerous callers to both the headquarters and the regional and field offices were assisted. While mail delivery gradually returned to normal during the fiscal year, many of the special requests by agencies that Board orders and decisions be sent to them by facsimile or e-mail became part of the regular case processing routine.

The procedures instituted by the Board in the aftermath of September 11th and the anthrax-by-mail incidents achieved its goal of ensuring that no party's rights in an MSPB proceeding would be adversely affected by those events. In addition, the experience provided valuable "lessons learned" as the Board began to develop a Continuity of Operations Plan (COOP) to guide the agency through any similar events in the future.

BOARD AND SENIOR STAFF CHANGES

The Board entered FY 2002 at full strength, with its membership consisting of Chairman Beth S. Slavet, Vice Chairman Barbara J. Sapin, and Member Susanne T. Marshall. The expiration of the recess appointment of Vice Chairman Sapin in December 2001, however, left the Board with a vacancy. Because the recess appointment of Ms. Slavet as Chairman also expired in December 2001, the Board found itself in a unique situation regarding the leadership of the agency. Under the Board's governing statute, the Chairman serves as the chief executive and administrative officer of the agency. When the office of Chairman is vacant, the Vice Chairman serves as Acting Chairman. When the office of Vice Chairman is vacant, the remaining member becomes Acting Chairman. In this situation, however, there were two members remaining on the Board—Ms. Marshall and Ms. Slavet—neither of whom was Chairman or Vice Chairman.

To provide for continuing executive and administrative leadership, Ms. Marshall and Ms. Slavet agreed to a shared-leadership arrangement during this interim period. They further agreed to retain the Chief of Staff appointed by Ms. Slavet so that the operations of MSPB offices, all of which report to the Chairman through the Chief of Staff, could continue without disruption. While major administrative decisions—such as filling the vacant Senior Executive Service (SES) positions—were deferred, the two Board members made all other administrative decisions jointly.

On February 7, 2002, President Bush designated Ms. Marshall to serve as Vice Chairman of the Board and announced his intention to nominate her to be Chairman. With that designation, she became the Acting Chairman. Subsequently, on August 6, 2002, she received a recess appointment by the President to the position of Chairman. At the end of FY 2002, her nomination was pending confirmation by the United States Senate. Although Ms. Slavet's term as a member of the Board ended on March 1, 2002, she stayed on under the provision of the Board's governing statute that allows a member to serve for up to one year beyond the expiration of her term or until a successor is confirmed, whichever occurs first. She remained on the Board until March 1, 2003.

After becoming Acting Chairman in February 2002, Ms. Marshall ensured a smooth transition by retaining the Chief of Staff appointed by Ms. Slavet for several more weeks. She also appointed her Chief Counsel as the Chief of Staff-designate, thus ensuring that the new incumbent of the position would be thoroughly familiar with MSPB operations. After working with the former incumbent on transition matters, the new Chief of Staff assumed his duties at the end of March. Chairman Marshall then moved quickly to fill the vacant SES position of Director of the Northeastern Regional Office in Philadelphia, selecting an experienced administrative judge from the Washington Regional Office. To ease the Director's transition into his new position, the responsibility for supervision of the New York Field Office was transferred to the Washington Regional Office. At the beginning of June, Chairman Marshall filled three vacant SES positions at headquarters, selecting a

long-time MSPB employee as the new Clerk of the Board and appointing experienced employees from other Federal agencies to the positions of Director, Office of Regional Operations, and Director, Office of Policy and Evaluation. At the end of FY 2002, only the Office of Appeals Counsel was still being managed by an Acting Director.

In early November 2001, the Board's Denver Field Office was relocated to a new facility in Lakewood, Colorado. The move took place over the Veterans Day holiday weekend, and the office was ready for business on Tuesday morning after the holiday. The relocation of the office was announced through an amendment to the Board's regulations published in the *Federal Register* (67 *Fed. Reg.* 57841, Nov. 19, 2001), a press release, and a notice posted to the MSPB website. While this was the only relocation of an MSPB office during FY 2002, substantial improvements to the office environment were made in both the Atlanta Regional Office and the New York Field Office.

ADJUDICATION OF CASES

During FY 2002, the Board continued to address the full range of both substantive and procedural issues that arise in the matters over which it has jurisdiction. As in prior years, it issued significant decisions interpreting provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Veterans Employment Opportunities Act (VEOA), and the Whistleblower Protection Act (WPA). Other decisions dealt with such matters as the appeal rights of Assistant United States Attorneys, the scope of an employee's right to a hearing under Chapter 77 of Title 5, and the appropriate

burden of proof when an agency removes a member of the SES for refusal to accept a directed reassignment. The Board also applied significant decisions issued in FY 2002 by the Supreme Court and the United States Court of Appeals for the Federal Circuit, the Board's principal reviewing court. The section of this report titled "Significant Judicial and Board Decisions Issued in FY 2002" provides a discussion of the most significant Board and court decisions issued during the fiscal year.

Soon after she became Acting Chairman, Ms. Marshall reassigned responsibility for a pilot program at headquarters, the Expedited Petition for Review (PFR) Program, from the Office of the Clerk of the Board to the Office of Appeals Counsel (OAC). The purpose of the pilot is to identify PFRs that can be resolved quickly so that the Board can focus its resources on complex cases. Although the pilot was considered successful while located in the Office of the Clerk, where cases were reviewed by a single OAC attorney, Chairman Marshall believed that with the additional resources available in OAC, even better results could be achieved if responsibility for the pilot were reassigned to that office. Following the reassignment, the average processing time for PFRs at headquarters was reduced by 54 days, or nearly two months, compared to a reduction of 33 days for a comparable period when the program was located in the Clerk's Office.

A new pilot program, the Mediation Appeals Project (MAP), was developed and launched during FY 2002. As reported in last year's Annual Report, the work of the Alternative Dispute Resolution (ADR) Working Group culminated in the Board's entering into a

contract with two ADR experts to develop a pilot program to test the use of mediation in the Board's appellate proceedings and to conduct mediation training for MSPB employees. Under the MAP, the parties to an appeal filed with an MSPB regional or field office are offered the opportunity to submit their dispute to a trained mediator. If the dispute cannot be resolved through that mediation, the appeal is returned to the regular adjudication process. Therefore, the MAP is intended to be a supplement to, not a replacement for, the Board's existing settlement programs.

During FY 2002, the Board announced MAP to all MSPB employees and solicited applications from employees interested in becoming mediators. This resulted in 15 MSPB employees being trained in transformative mediation techniques. Each of these trained mediators is to conduct three co-mediations with one of the contractors during the pilot period. Three MSPB regional offices are serving as pilot sites. The co-mediations are continuing in FY 2003 and, at the end of the pilot period, the results achieved by the pilot program will be evaluated. After the evaluation has been completed, the Board will determine whether the MAP will be continued. In the meantime, the Board's existing settlement programs continue to be successful. In the regional and field offices, 54 percent of appeals that were not dismissed for lack of jurisdiction, untimely filing, or other reasons were settled in FY 2002. At headquarters, settlements were achieved in 26 percent of the PFRs selected for the PFR Settlement Program.

The suspended case pilot program, launched early in FY 2000, was

incorporated into the Board's standard adjudicatory procedures in FY 2002. This pilot tested whether allowing extended time for the parties to engage in discovery or settlement efforts could improve the Board's case processing. If the parties to an appeal jointly request a 30-day suspension to pursue discovery or settlement efforts, the administrative judge will grant it, without requiring the parties to provide evidence and argument to support the request. A second 30-day suspension will be granted if the parties agree that further time is needed. The administrative judge also has discretion to grant a unilateral request for a second 30-day extension. An evaluation of the pilot in FY 2001 concluded that the program facilitates due process while maintaining controls to ensure timely processing of appeals and recommended that the program be made permanent. The Board approved this recommendation early in FY 2002. Interim regulations were published January 28, 2002 (*67 Fed. Reg.* 3811), and, following review of public comments, final regulations were published on September 19, 2002 (*67 Fed. Reg.* 58961).

The Board made a major addition in FY 2002 to its public information materials that are intended to familiarize parties and representatives with the Board's appellate procedures. It released a new video, "Introduction to Federal Employee Appeals with the Merit Systems Protection Board," in October 2001. The half-hour video format permits an explanation of the Board's appellate procedures in greater depth than is practical in the print publications the Board has disseminated for many years. The professionally produced video covers such subjects as filing an appeal, discovery procedures, pre-hearing

submissions, the pre-hearing conference, the hearing, issuance of an initial decision, and further appeal rights. The video is available on tape in VHS format and on CD-ROM in both Windows and Mac formats. It can be ordered from the Clerk of the Board and is also available for viewing in the MSPB headquarters library and in the regional and field offices. The Board announced the availability of the video through issuance of a press release on October 15, 2001, and immediately began receiving numerous orders. A customer satisfaction survey was enclosed with each videotape and CD-ROM ordered, and the returns tabulated by the MSPB Office of Policy and Evaluation indicated a high customer satisfaction rate.

MERIT SYSTEMS STUDIES

During FY 2002, the Board issued four reports of merit systems studies conducted by its Office of Policy and Evaluation (OPE). Three of these reports were based on new studies—a 20-year retrospective on the achievements and challenges of the Office of Personnel Management (OPM), an examination of the Federal merit promotion process, and a study of how Federal job seekers are assessed in a delegated examining environment. The section of this report titled "Summaries of Merit Systems Studies Issued in FY 2002" provides brief summaries of the findings and recommendations from these reports.

In response to the call of the National Commission on the Public Service (Volcker Commission) for input on issues affecting public service reform, OPE prepared a special report, "Making the Public Service Work: Recommendations for Change," for submission to the Commission. This report, based on

recommendations from past MSPB studies, highlighted various aspects of the human capital crisis and offered recommendations to improve human resources management in the Federal sector.

With respect to workforce capacity problems, the report noted that these problems frequently result from the mismatch between the mission requirements of agencies and the number, types, and skills of agency employees. The report recommended that the Federal hiring process be simplified by reducing the number of special hiring authorities, replacing the Rule of Three with a category ranking system, terminating the *Luevano* consent decree, and encouraging the use of intern programs. [The report was issued several months prior to the enactment of the Homeland Security Act, which authorizes OPM to issue regulations allowing agencies to use category ranking systems.] The report also recommended improving candidate assessment through the use of better competency-based assessment tools. Additional recommendations included reshaping the workforce by authorizing early retirements and more flexible buyouts and allowing retirement-eligible employees to work part-time without a negative impact on their annuities.

To enhance the Government's personnel management capability, the report recommended adopting a simpler, more flexible classification system that could easily accommodate changes in organizational priorities and employee skills and assignments. It also recommended that pay banding be authorized in all agencies to increase the Government's ability to offer competitive pay, tie pay raises to performance, and

provide fair and attractive career paths to both technical and managerial employees. The report noted that the use of pay banding is supported by studies showing that it has the potential to raise organizational performance, increase managerial accountability, and help the Government attract and retain the talent it needs. The report also recommended that assessment and selection of managers focus on managerial skills, rather than technical skills, and that flexible supervisory probationary periods be permitted.

Noting that the Government must transform its culture if it is to solve its human capital problems, the report explained that while the Government's culture prizes fairness, openness, and neutrality, it also suffers from a distrustful working environment, risk aversion, and emphasis on command and control. The report recommended that the Government balance the authority and responsibility of managers better, explaining that mandated reviews of managerial actions and decisions made at higher organizational levels add to a distrustful environment. The report also recommended that agencies appoint chief human capital officers at the same level as chief financial officers and chief operating officers to integrate sound human capital strategies into agencies' long-term plans and objectives.

The Board issued four editions of the OPE newsletter, *Issues of Merit*, during FY 2002. Topics covered included the effects of both the Rule of Three and category ranking on the employment of veterans, differences in attitudes between minority and non-minority Federal employees, the status of the advancement of women in the Federal Government,

alternatives to competitive procedures for promoting employees with known skills and abilities, and the effectiveness of recruitment tools used by agencies.

The OPE staff also continued to serve as a valuable resource for the Board in meeting internal agency research needs. Its principal service in this regard during FY 2002 was its design of the survey of customers of the new appeals process video and its tabulation and evaluation of the returns. The OPE staff also conducted one of its periodic surveys of the customers of MSPB studies and evaluated the results during FY 2002.

CUSTOMER SERVICE INITIATIVES

In addition to releasing its new appeals process video, the Board took a number of other steps in FY 2002 aimed at increasing both the amount and usefulness of the information it makes available to its customers. The Office of the Clerk completed the major project of adding to the decisions database on the MSPB website *key* precedential Board decisions issued between the inception of the agency in 1979 and 1994, when the website was launched. (Decisions issued since 1994 have been posted to the website when issued.) In addition, a complete redesign of the website was begun during the fiscal year and was subsequently implemented in February 2003.

Early in the fiscal year, as an added service to its customers, the Board implemented two list servers (listservs) on its website. One provides e-mail notification to subscribers when new Board decisions are added to the website and includes links to the actual decisions. The other notifies subscribers when a new

report of a merit systems study or a new edition of *Issues of Merit* is published. The e-mail notice for the latter listserv includes a link to the press release announcing the new report or a link to the actual *Issues of Merit* newsletter. Interested persons may subscribe to either or both listservs on the MSPB website by entering a user name and e-mail address. (Subscriptions are also available through the Government Printing Office listserv website.)

A major customer service project for the MSPB, as for all Federal agencies, during FY 2002 was the development and publication of Information Quality Guidelines. Section 515 of the Treasury & General Government Appropriations Act for FY 2001 (Public Law No. 106-554) required all agencies to: (1) develop and publish agency guidelines for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency; (2) establish an administrative mechanism to allow affected persons to obtain correction of information disseminated by the agency that does not comply with the guidelines; and (3) report periodically to the Office of Management and Budget (OMB) on the number and nature of complaints received regarding information disseminated by the agency and how the complaints were resolved. The law required individual agency guidelines to be based on governmentwide guidelines promulgated by OMB and posted to the agency's website by October 1, 2002.

With the Office of the Clerk coordinating the project, all MSPB offices first identified the information they produce for dissemination to the public and then reviewed the internal procedures they employ to ensure the quality of that

information. Because effective quality control procedures were already in place with respect to most disseminated information, few changes in procedures were necessary. As required by OMB, the Board published draft Information Quality Guidelines to its website on May 1, 2002. After the required public comment period, a few revisions were made at the request of OMB, primarily to promote uniformity in agency guidelines throughout the Executive Branch. The Board published a notice in the *Federal Register* on September 27, 2002 (67 *Fed. Reg.* 61168), announcing that its Information Quality Guidelines were available on its website and would be effective as of October 1, 2002. As stated in the introduction to the MSPB Guidelines, their purpose is to ensure that information disseminated by the MSPB is presented in an accurate, clear, complete, and unbiased manner; is useful to the intended users; and is protected from unauthorized access or revision. As a part of the redesign of its website, the Board created an “Information Quality” page that contains the MSPB Guidelines, information on how to file a complaint alleging that disseminated information does not comply with the Guidelines, and related information.

LEGISLATION

The Board’s legislative liaison activity during FY 2002 focused primarily on reauthorization and appropriations. Because the previous authorization for the Board was due to expire at the end of FY 2002, reauthorization legislation was introduced in the 2nd session of the 107th Congress. The reauthorization language was originally included in a bill to amend the Whistleblower Protection Act but was ultimately enacted as part of a bill to

authorize certain employees to make catch-up contributions to the Thrift Savings Plan (H.R. 3340). Enacted as Public Law No. 107-304 on November 27, 2002, the reauthorization is for a 5-year period, through the end of FY 2007. While the FY 2002 appropriation for the MSPB was enacted in November 2001, the agency did not receive its FY 2003 appropriation until enactment of the Consolidated Appropriations Act for that year (H.J. Res. 2, Public Law No. 108-7) on February 20, 2003.

Among the new laws enacted during FY 2002, perhaps the one of greatest significance to the MSPB was the Aviation and Transportation Security Act, Public Law No. 107-71, which was signed by the President on November 19, 2001. This law established a major new Federal agency, the Transportation Security Administration (TSA), within the Department of Transportation. [On March 1, 2003, the TSA became part of the Department of Homeland Security.] It was estimated that TSA would eventually have 60,000 to 70,000 employees. While a substantial number of employees were to be transferred from security operations at the Federal Aviation Administration (FAA), the new agency was expected to hire around 50,000 airport screeners. The law provided that TSA employees would initially be covered by the same personnel system that applies to employees of the FAA, which includes appeal rights to the Board. However, it gave the head of the TSA authority to modify that system for application to TSA employees. In addition, the law gave the agency head unreviewable authority to hire, discipline and terminate TSA screeners, notwithstanding any other provision of law. From the Board’s standpoint, these statutory provisions meant that new issues

could be expected to arise in appeals filed by TSA employees regarding the extent of the Board's jurisdiction over the employee filing the appeal and the precise personnel rules that applied at the time the personnel action was taken. Fewer than a dozen appeals from TSA employees were received in the MSPB regional and field offices during the first year of TSA operations, and only one initial decision in a TSA appeal had reached the Board for review by January 2003.

The new Department of Homeland Security (DHS) was created by the Homeland Security Act, enacted as Public Law No. 107-296 on November 25, 2002, less than two months after the end of the fiscal year covered by this report. The Act provides unprecedented authority for the Secretary of Homeland Security, in conjunction with the Director of the Office of Personnel Management (OPM), to prescribe personnel rules for DHS employees. It permits the waiver of many

provisions of the Title 5 civil service system, including provisions that authorize appeals of various personnel actions to the Board. The Act requires the Secretary of Homeland Security and the OPM Director to consult with the Board, prior to issuing regulations for the DHS personnel system, regarding the extent to which the Title 5 provisions governing appeals to the Board should be applied to DHS employees. In carrying out its required consultative role, the Board's principal concern will be to ensure that DHS employees are afforded adequate due process with respect to adverse personnel actions. The Board's experience in dealing with employee appeals over the years should provide a valuable perspective as the Secretary and the Director develop the regulations for a human resources management system, including procedures for appeals, that address the unique requirements of this new department.

The MSPB Annual Report is no longer required by statute but is published as a service to the Board's customers. (The statutory requirement for an annual report was "sunset" by the Federal Reports Elimination and Sunset Act, Public Law 104-66, as amended by Public Law 106-113.) The Annual Report is intended to be a companion to the annual Performance Report required by the Government Performance and Results Act. The FY 2002 Performance Report was issued on February 27, 2003, and contains additional information regarding the Board's achievements in FY 2002.

Board Members

CHAIRMAN

SUSANNE T. MARSHALL was appointed by President Bush on August 6, 2002, to serve as Chairman of the Merit Systems Protection Board. She had served as Acting Chairman of the Board since February 7, 2002, when President Bush designated her Vice Chairman. (Under the Board's governing statute, the Vice Chairman serves as Acting Chairman when the position of Chairman is vacant.) She has been a member of the Board since November 17, 1997, following her nomination by President Clinton and confirmation by the Senate. From December 1985 until her appointment to the Board, she served on the Republican staff of the Committee on Governmental Affairs of the United States Senate as both Professional Staff and Deputy Staff Director. While on the committee staff, she was responsible for a variety of legislative issues under the committee's jurisdiction, including Federal workforce policies, civil service matters, and postal issues. From 1983 to 1985, she was Republican Staff Assistant to the House Government Operations Committee. She was Legislative Assistant to a Member from Georgia from 1981 to 1982. Ms. Marshall attended the University of Maryland branch campus in Munich, Germany, and the American University.



The bipartisan Board consists of a Chairman, a Vice Chairman, and a Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms.

MEMBER

NEIL A.G. McPHIE was appointed by President Bush to serve as a member of the Merit Systems Protection Board on April 23, 2003. Prior to joining the Board, he was Senior Assistant Attorney General in the Office of the Attorney General of Virginia. Among other responsibilities, he defended employment discrimination claims brought under Federal law and wrongful discharge claims brought under state law. Previously, he was Executive Director of the Virginia Department of Employment Dispute Resolution (EDR). In that position, he directed implementation of EDR's statewide grievance, mediation, training and consultation programs. He was an Assistant Attorney General in the Office of the Attorney General of Virginia from 1982 to 1988. From 1976 until he joined the Attorney General's Office, he was a Trial and Appellate Attorney in the Office of the General Counsel at the U.S. Equal Employment Opportunity



Commission. He received his J.D. degree from Georgetown University Law Center in 1976. He received a B.A. in Economics from Howard University in 1973, graduating magna cum laude. He is a member of Phi Beta Kappa. He is admitted to the bars of the District of Columbia, Virginia, New York and Iowa, the United States Supreme Court, the United States District Court for the District of Columbia, several of the United States circuit courts of appeals, and district courts in Virginia

BETH S. SLAVET served as Chairman of the Board under a recess appointment that expired with the adjournment of Congress on December 21, 2001. She served as Member of the Board for the remainder of FY 2002 and continued in that position until March 1, 2003. She joined the Board as a member and Vice Chairman in August 1995, and from March 2000 until December of that year, she also served as Acting Chairman. Prior to her appointment to the Board, she served as Labor Counsel to the Committee on Labor and Human Resources of the United States Senate.

BARBARA J. SAPIN served as a member and Vice Chairman of the Board under a recess appointment that expired with the adjournment of Congress on December 21, 2001. Prior to her appointment in December 2000, she served as General Counsel to the American Nurses Association (ANA).

Board Organization

The **Chairman, Vice Chairman, and Member** adjudicate the cases brought to the Board. The **Chairman**, by statute, is the chief executive and administrative officer of the Board. Office heads report to the Chairman through the Chief of Staff.

The **Office of Regional Operations** oversees the ten MSPB regional and field offices, which receive and process appeals and related cases. Administrative judges in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair and well reasoned initial decisions.

The **Office of the Administrative Law Judge** adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the Board. (The functions of this office are currently performed by administrative law judges at the National Labor Relations Board under an interagency agreement.)

The **Office of Appeals Counsel** conducts legal research and prepares proposed decisions for the Board in cases where a party petitions for review of a judge's initial decision and in all other cases decided by the Board, except for those cases assigned to the Office of the General Counsel. The office also conducts the Board's petition for review settlement program and the expedited petition for review pilot program, prepares proposed decisions on interlocutory

appeals of rulings made by judges, makes recommendations on reopening cases on the Board's own motion, and provides research and policy memoranda to the Board on legal issues.

The **Office of the Clerk of the Board** receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's decisions and orders. The office serves as the Board's public information center, coordinates media relations, produces public information publications, operates the Board's Library and on-line information services, and administers the Freedom of Information Act and Privacy Act programs. The office also certifies official records to the courts and Federal administrative agencies, and manages the Board's records and directives systems, legal research programs, and the Government in the Sunshine Act program.

The **Office of the General Counsel**, as legal counsel to the Board, provides advice to the Board and MSPB offices on matters of law arising in day-to-day operations. The office represents the Board in litigation, prepares proposed decisions for the Board on assigned cases, and coordinates the Board's legislative policy and congressional relations functions. The office also drafts regulations, conducts the Board's ethics program, and plans and directs audits and investigations.

The **Office of Policy and Evaluation** carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems. Reports of these studies are directed to the

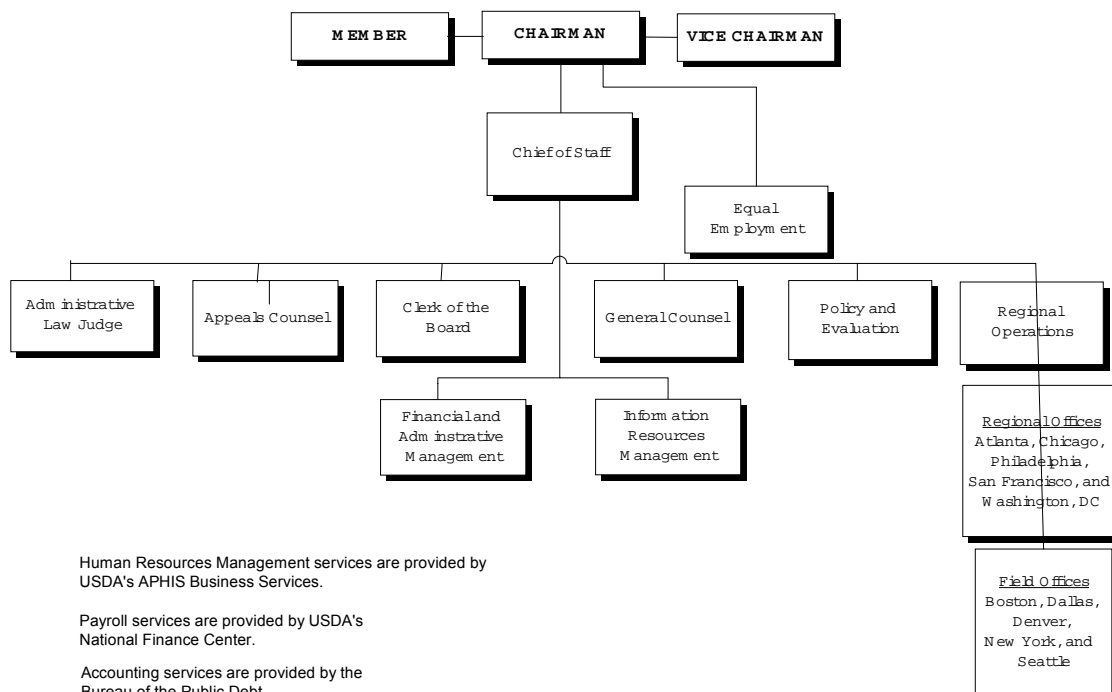
President and the Congress and are distributed to a national audience. The office responds to requests from Federal agencies for information, advice, and assistance on issues that have been the subject of Board studies. The office also provides oversight of the agency's human resources management function and administers the cross-servicing agreement with the U.S. Department of Agriculture's APHIS Business Services for human resources management services.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates the Board's equal employment opportunity programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors.

The **Office of Financial and Administrative Management** administers the budget, procurement, property management, physical security, and general services functions of the Board. It develops and coordinates internal management programs and projects, including review of internal controls agencywide. It also administers the agency's cross-servicing agreements with the U.S. Department of Agriculture's National Finance Center for payroll services and the Department of the Treasury's Bureau of the Public Debt for accounting services.

The **Office of Information Resources Management** develops, implements, and maintains the Board's automated information systems to help the Board manage its caseload efficiently and carry out its administrative and research responsibilities.

Merit Systems Protection Board



Significant Judicial and Board Decisions Issued in FY 2002

When deciding cases, the Board is bound by applicable precedent from the Supreme Court of the United States and the United States Court of Appeals for the Federal Circuit. In FY 2002, the Supreme Court and the Federal Circuit issued several significant decisions relevant to the Board's adjudicatory function.

The Supreme Court's opinion in *U.S. Postal Service v. Gregory*, 534 U.S. 1, 122 S. Ct. 431 (November 13, 2001), arose directly from a Board case. At issue in *Gregory* was the question whether the Board is precluded from considering a prior disciplinary action that is pending in a grievance proceeding when the Board reviews the reasonableness of a penalty imposed by the agency for subsequent misconduct. The Court found that the Board may consider such prior discipline. As a practical matter, the Court observed that if the Board had to wait until the grievance process was completed, undue delay could result. Further, if the Board were forced to ignore prior discipline that was pending in grievance, agencies would effectively be prevented from relying on an employee's disciplinary record when defending a later action before the Board. Both principles are illustrated in *Guzman-Muelling v. Social Security Administration*, 91 M.S.P.R. 601 (June 14, 2002).

In *Guzman-Muelling*, the agency suspended the appellant for 30 days. In selecting that penalty, the agency considered the appellant's past disciplinary record, which consisted of a 3-day suspension and a 10-day

suspension. The appellant had filed grievances from both the 3-day and the 10-day suspensions, and the grievances were still pending at the time of the Board appeal. Applying the Court's decision in *Gregory*, the Board considered both of the prior suspensions in determining whether the 30-day suspension was reasonable. The Board noted in particular that the appellant had taken no action on either grievance since requesting an arbitrator for each in 1999. Thus, undue delay in the Board proceedings was avoided by not requiring the Board to wait until the grievances were resolved, and the agency was able to rely on the prior discipline in supporting its choice of a 30-day suspension for the most recent misconduct.

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835 (November 13, 2001), the Supreme Court defined "prevailing party" for purposes of an award of attorney fees. It stated that a "prevailing party" is one who has been awarded some relief by the court or who has gained a settlement agreement enforced through a court-ordered consent decree. A party therefore is entitled to attorney fees only where there is a judicially sanctioned change in the parties' legal relationship. In *Sacco v. Department of Justice*, 90 M.S.P.R. 37 (September 4, 2001), the Board recognized the applicability of the *Buckhannon* rule to fee awards made under 5 U.S.C. § 7701(g), which allows an award of attorney fees only to a

“prevailing party.” The Federal Circuit affirmed the Board’s decision in *Sacco*. *Sacco v. Department of Justice*, Nos. 02-3043, -3050 (Federal Circuit January 21, 2003).

An example of how the Board has applied *Buckhannon* can be found in *Cole v. Department of Justice*, 90 M.S.P.R. 627 (December 20, 2001). The Board determined that the appellant in *Cole* was not a “prevailing party” because the agency had completely rescinded the action before the Board issued a decision on the merits of the appeal. In such a situation, the appellant did not receive an enforceable judgment on the merits or a court-ordered consent decree, as required by *Buckhannon*.

A Supreme Court decision that may potentially affect the way in which the Board reviews claims of disability discrimination is *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681 (January 8, 2002). There, the Court held that, under the Americans with Disabilities Act, the inquiry in deciding whether an individual is “substantially limited” in doing manual tasks must focus on whether the individual has an impairment that prevents or severely restricts the performance of activities that are of central importance to most people’s daily lives, not whether he is unable to perform the specific manual tasks associated with his job. The impairment’s impact also must be permanent or long term. The Board did not have occasion in FY 2002 to directly apply the holding in *Toyota Motor* to a disability discrimination claim.

Fiscal Year 2002 saw the Federal Circuit issue several notable opinions

interpreting sections of Title 5 of the United States Code. In *Delos Santos v. Office of Personnel Management*, 289 F.3d 1382 (May 17, 2002), the court found that the Board’s decision to review an Office of Personnel Management regulation is, by the terms of 5 U.S.C. § 1204(f)(1), within the Board’s “sole discretion.” The court stated that it may review the Board’s refusal to grant regulation review only if, in doing so, the Board considered the merits of the underlying agency action.

The Federal Circuit construed section 3330a(d)(1) of Title 5 in *Lapuh v. Merit Systems Protection Board*, 284 F.3d 1277 (March 21, 2002). It found that the Veterans Employment Opportunities Act of 1998, of which that statutory provision was a part, did not give the Board jurisdiction to adjudicate claims of violations of veterans’ preferences when the alleged violations occurred before the October 31, 1998, effective date of that Act.

In *Roman v. Central Intelligence Agency*, 297 F.3d 1363 (July 29, 2002), the court interpreted 5 U.S.C. § 8415(e)(1)(B), which governs the proration of an annuity to reflect service performed on a part-time basis. The court held that the statute should be construed consistent with the desire of Congress to ensure equitable treatment for full-time employees who convert to part-time status. The court therefore rejected a construction of the statute that would treat imputed service as part-time service simply because it was preceded by a period of part-time work. To use such a methodology to calculate an annuity would, in the court’s opinion, dramatically penalize employees who, despite the onset

of illness, try to work at least part time before applying for disability retirement.

In a decision with potentially far-reaching implications for the staffing of the veterans' health care system, the Federal Circuit held in *James v. Von Zemenszky*, 284 F.3d 1310 (April 1, 2002), that although the statute at 38 U.S.C. § 7421(a) gives the Secretary of the Department of Veterans Affairs the authority to prescribe "the hours and conditions of employment" of health-care professionals, such employees are nonetheless entitled to the reduction-in-force procedures of Title 5 during "staffing adjustments."

The Board also issued several other noteworthy decisions in FY 2002. In *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298 (September 4, 2002), the Board announced a new test for establishing jurisdiction in an individual right of action (IRA) appeal brought under the Whistleblower Protection Act. The Board stated that an appellant establishes Board jurisdiction over an IRA appeal by merely exhausting proceedings before the Office of Special Counsel and making non-frivolous allegations that he made a protected disclosure that was a contributing factor in a covered personnel action. The earlier jurisdictional test required an appellant to actually prove by preponderant evidence that he made a protected disclosure, that the agency had taken a covered personnel action, and that he had exhausted Special Counsel proceedings.

The Board in *Hamlett v. Department of Justice*, 90 M.S.P.R. 674 (January 25, 2002), decided a question that had arisen in prior cases, but which never had to be reached, namely, whether Assistant

United States Attorneys (AUSAs) have Board appeal rights from adverse actions under Chapter 75 of Title 5. Even though the statute at 28 U.S.C. § 542(b) states that "[e]ach [AUSA] is subject to removal by the Attorney General," the Board found no provision in Title 5 excluding AUSAs from coverage under Chapter 75 or any indication in the legislative history of the pertinent civil service statutes showing congressional intent that AUSAs not have Board appeal rights under Chapter 75. On the contrary, the Board noted legislative history showing that Congress intended attorneys at the Department of Justice to fall within the definition of "employee" in 5 U.S.C. § 7511. Thus, the Board held that AUSAs are not excluded from the provisions of Chapter 75 by virtue of 28 U.S.C. § 542(b).

Another appeal in which the Board looked to the legislative history of a statute was *Shenwick v. Department of State*, 92 M.S.P.R. 289 (September 4, 2002). The issue in *Shenwick* concerned the burden of proof applicable to the removal of a member of the Senior Executive Service (SES) for refusing a directed reassignment. In part because the legislative history of the Civil Service Reform Act of 1978 shows that Congress intended the SES to be a mobile corps of managers who may be expeditiously reassigned to meet shifting agency needs, the Board found that an agency need not prove that removal of an SES employee promotes the efficiency of the service. Rather, the agency need only show that the SES employee was qualified for the reassignment, as required under 5 U.S.C. § 3395(a)(1)(A), and that it removed the employee for refusal to accept the reassignment, which is cause for removal under 5 U.S.C. § 7543(a).

The issue of burden of proof also arose in *Bloomer v. U.S. Postal Service*, 90 M.S.P.R. 324 (November 14, 2001). There, the Board described the burdens of proof that apply in appeals filed under the Uniformed Services Employment and Reemployment Rights Act of 1994. The Board determined that if the appellant shows by preponderant evidence that his uniformed service was a substantial or motivating factor in the agency's adverse decision, the burden shifts to the agency to prove that it would have taken the same action absent the protected status.

As noted above, the Federal Circuit in *Von Zemenszky* held that health-care professionals in the Department of Veterans Affairs are generally entitled to the reduction-in-force procedures of Title 5 during "staffing adjustments." The Board, however, in *Beckstrom-Parcell v. Department of Veterans Affairs*, 91 M.S.P.R. 656 (June 25, 2002), noted a statutory exception to this rule. The Board observed that appointments of Department of Veterans Affairs health-care professionals under 38 U.S.C. § 7405(a)(1) are made "without regard to civil service ... laws, rules, or regulations." In view of that language, the Board found that employees appointed under 38 U.S.C. § 7405(a)(1) are exempt from Title 5 reduction-in-force procedures, which are part of the civil service laws and regulations.

With respect to Board procedures, the opinion in *Crickard v. Department of Veterans Affairs*, 92 M.S.P.R. 625 (September 30, 2002), set forth the scope of an appellant's right to a hearing under 5 U.S.C. § 7701(a). In that case, the administrative judge held a videoconference hearing instead of the in-

person hearing that the appellant had requested. The Board ruled that, under section 7701(a), a request for an in-person hearing may not be denied by an administrative judge in the absence of a showing of good cause.

In *Pawn v. Department of Agriculture*, 90 M.S.P.R. 473 (December 28, 2001), the Board applied the "interest of justice" standard set forth in the attorney fees provision of 5 U.S.C. § 7701(g)(1). It held that, when an employee's removal had been found to be based solely on his criminal conviction, and when that conviction was overturned on appeal, the employee was "substantially innocent" of the charges on which the removal was based. The appellant therefore was entitled to an award of attorney fees in "the interest of justice." The Board also held that this rule applied even where the conviction was overturned based on a violation of the employee's constitutional rights, rather than on the merits of the criminal charge.

Finally, in *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269 (December 10, 2001), the Board weighed contrasting public-policy concerns in deciding whether to enforce a provision in a settlement agreement. Even though public policy favors settlement agreements, the Board held that it would be contrary to public policy to enforce a provision in a settlement agreement that requires the appellant's former employing agency to withhold criminal or police records from the Office of Personnel Management where such information was requested as part of a background check and was relevant to the Government position sought by the appellant.

FY 2002 Case Processing Statistical Data

CASES DECIDED BY MSPB IN FY 2002

Cases Decided in MSPB Regional/Field Offices (RO/FOs):	
Appeals	6,378
Addendum Cases ¹	723
Stay Requests ²	93
TOTAL Cases Decided in RO/FOs	7,194
Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction Only ³	22
Cases Decided by the Board:	
Appellate Jurisdiction:	
PFRs - Appeals	1,073
PFRs - Addendum Cases	124
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	1
Reopenings ⁴	6
Court Remands	6
Compliance Referrals	62
EEOC Non-concurrence Cases	0
Arbitration Cases	3
Subtotal – Appellate Jurisdiction	1,275
Original Jurisdiction ⁵	9
TOTAL Cases Decided by the Board ⁶	1,284
TOTAL Cases Decided (Board, ALJs, RO/FOs)	8,500

See next page for footnotes.

FOOTNOTES TO TABLE

- ¹ Includes 213 requests for attorney fee awards, 7 requests for compensatory damages (discrimination cases only), 1 request for consequential damages (whistleblower cases only), 361 petitions for enforcement, 124 Board remand cases, and 17 court remand cases.
- ² Includes 50 stay requests in whistleblower cases and 43 in non-whistleblower cases.
- ³ Initial decisions issued by ALJs. Case type breakdown: 2 court remands and 1 reopening in Office of Special Counsel (OSC) disciplinary actions (non-Hatch Act), 5 Hatch Act cases, 1 request for stay of a Board order in a Hatch Act case, 11 actions against ALJs, and 2 requests for attorney fees in ALJ cases.
- ⁴ Includes 4 cases reopened by the Board on its own motion and 2 cases where OPM requested reconsideration.
- ⁵ Board decisions. Case type breakdown: 2 OSC stay requests, 1 PFR on a petition for enforcement in an OSC corrective action, 1 PFR in a Hatch Act case, 1 PFR in an action against an ALJ, and 4 requests for regulation review.
- ⁶ In addition to the 1,284 cases closed by the Board with a decision or order, there were 5 interlocutory appeals decided by the Board in FY 2002. Interlocutory appeals typically raise difficult issues or issues not previously addressed by the Board.

Regional Decisions

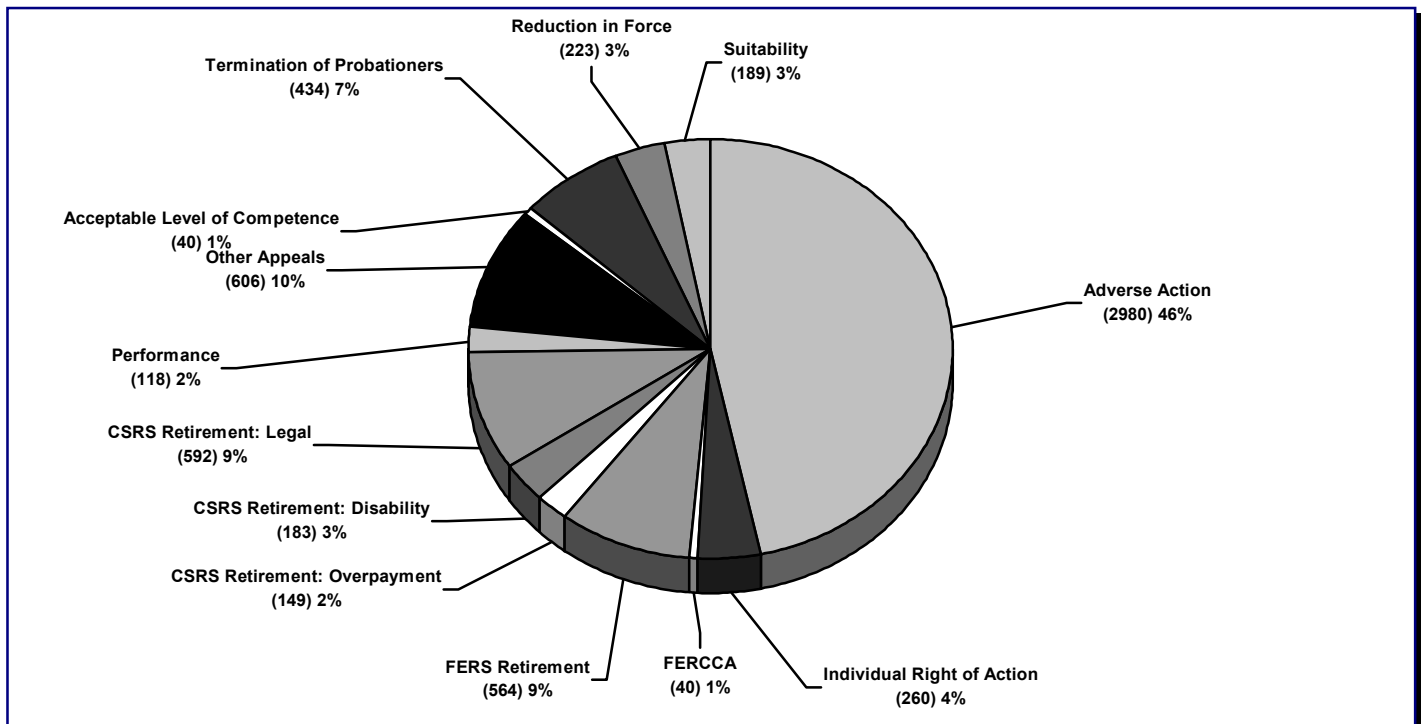
DISPOSITION OF APPEALS DECIDED IN FY 2002 BY TYPE OF CASE

Type of Case	Decided	Dismissed		Not				Adjudicated	
				Dismissed	Settled				
Adverse Action by Agency	2980	1353	45%	1627	55%	1096	67%	531	33%
Termination of Probationers	434	389	90%	45	10%	36	80%	9	20%
Reduction in Force	223	148	66%	75	34%	35	47%	40	53%
Performance (Chapter 43)	118	34	29%	84	71%	51	61%	33	39%
Acceptable Level of Competence (WIGI)	40	23	58%	17	43%	13	76%	4	24%
Suitability	189	58	31%	131	69%	98	75%	33	25%
CSRS Retirement: Legal	592	269	45%	323	55%	16	5%	307	95%
CSRS Retirement: Disability	183	76	42%	107	58%	9	8%	98	92%
CSRS Retirement: Overpayment	149	54	36%	95	64%	62	65%	33	35%
FERS Retirement	564	221	39%	343	61%	136	40%	207	60%
FERCCA	40	26	65%	14	35%	0	0%	14	100%
Individual Right of Action	260	198	76%	62	24%	41	66%	21	34%
Other	606	528	87%	78	13%	36	46%	42	54%
Total	6378	3377	53%	3001	47%	1629	54%	1372	46%

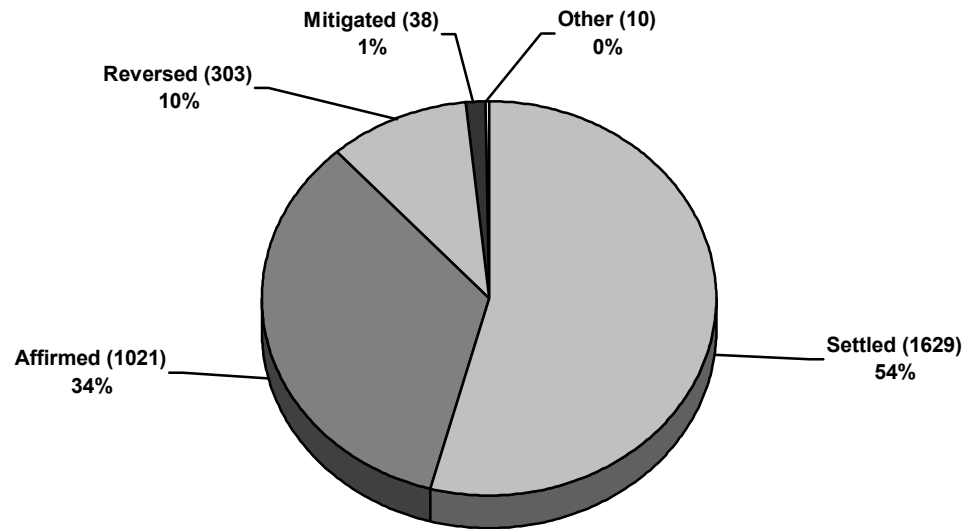
Dismissed and **Not Dismissed** columns are percentages of **Decided** column

Settled and **Adjudicated** columns are percentages of **Not Dismissed** column

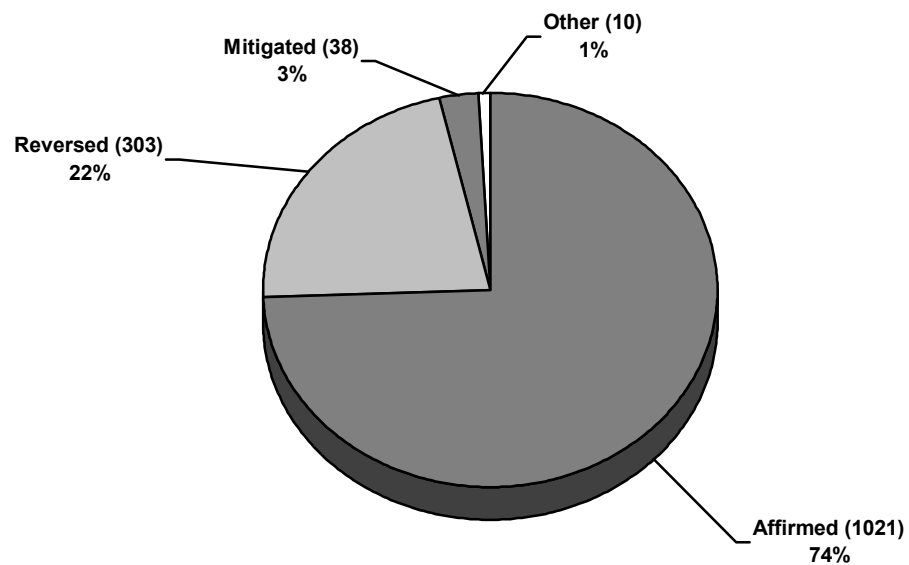
TYPES OF APPEALS DECIDED IN FY 2002



Total Number of Appeals: 6,378

DISPOSITION OF APPEALS IN FY 2002 THAT WERE NOT DISMISSED

Total Number of Appeals that were Not Dismissed: 3,001
(Percentages do not total 100% because of rounding)

**DISPOSITION OF APPEALS ADJUDICATED ON THE MERITS
(i.e., Not Dismissed or Settled) IN FY 2002**

Based on 1,372 appeals adjudicated on the merits

APPEALS DECIDED IN FY 2002 BY AGENCY

	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
US Postal Service	1442	814	56.4%	628	43.6%	450	71.7%	178	28.3%	
Office, Personnel Mgmt*	1413	542	38.4%	871	61.6%	234	26.9%	637	73.1%	
Veterans Affairs	499	288	57.7%	211	42.3%	133	63.0%	78	37.0%	
Justice	450	261	58.0%	189	42.0%	125	66.1%	64	33.9%	
Navy	361	219	60.7%	142	39.3%	85	59.9%	57	40.1%	
Treasury	361	210	58.2%	151	41.8%	95	62.9%	56	37.1%	
Army	338	168	49.7%	170	50.3%	105	61.8%	65	38.2%	
Defense	262	153	58.4%	109	41.6%	64	58.7%	45	41.3%	
Air Force	213	101	47.4%	112	52.6%	73	65.2%	39	34.8%	
Agriculture	194	126	64.9%	68	35.1%	56	82.4%	12	17.6%	
Interior	163	87	53.4%	76	46.6%	41	53.9%	35	46.1%	
Transportation	125	64	51.2%	61	48.8%	36	59.0%	25	41.0%	
Health & Human Serv	110	54	49.1%	56	50.9%	34	60.7%	22	39.3%	
General Service Adm	57	43	75.4%	14	24.6%	2	14.3%	12	85.7%	
Social Security Adm	50	35	70.0%	15	30.0%	8	53.3%	7	46.7%	
Commerce	45	24	53.3%	21	46.7%	13	61.9%	8	38.1%	
Labor	41	28	68.3%	13	31.7%	9	69.2%	4	30.8%	
Housing & Urban Dev	38	27	71.1%	11	28.9%	9	81.8%	2	18.2%	
Energy	20	13	65.0%	7	35.0%	4	57.1%	3	42.9%	
NASA	15	8	53.3%	7	46.7%	5	71.4%	2	28.6%	
Smithsonian Inst	15	6	40.0%	9	60.0%	7	77.8%	2	22.2%	
Education	12	9	75.0%	3	25.0%	2	66.7%	1	33.3%	
FDIC	12	8	66.7%	4	33.3%	3	75.0%	1	25.0%	
SBA	12	8	66.7%	4	33.3%	4	100.0%	0	.0%	
EEOC	11	8	72.7%	3	27.3%	2	66.7%	1	33.3%	
TVA	11	7	63.6%	4	36.4%	0	.0%	4	100.0%	
State	9	5	55.6%	4	44.4%	3	75.0%	1	25.0%	
Other	9	9	100.0%	0	.0%	0	.0%	0	.0%	
FCC	6	5	83.3%	1	16.7%	0	.0%	1	100.0%	
Court Serv & Offend Super Agency for DC	5	1	20.0%	4	80.0%	4	100.0%	0	.0%	
FEMA	5	5	100.0%	0	.0%	0	.0%	0	.0%	
GPO	5	1	20.0%	4	80.0%	3	75.0%	1	25.0%	
NLRB	5	5	100.0%	0	.0%	0	.0%	0	.0%	
Chemical Safety Hazard Investigation Bd	4	3	75.0%	1	25.0%	1	100.0%	0	.0%	
EPA	4	1	25.0%	3	75.0%	2	66.7%	1	33.3%	
National Credit Union Adm	4	2	50.0%	2	50.0%	1	50.0%	1	50.0%	
Nuclear Regulatory Com	4	3	75.0%	1	25.0%	0	.0%	1	100.0%	
US International Development Agency	4	4	100.0%	0	.0%	0	.0%	0	.0%	

APPEALS DECIDED IN FY 2002 BY AGENCY
(continued)

	Decided	Dismissed ¹	Dismissed ¹	Not Dismissed ¹	Settled ²	Settled ²	Adjudicated ²	Adjudicated ²	
Boundary & Water Com: US/MEX	3	1	33.3%	2	66.7%	0	.0%	2	100.0%
Commodity Futures Trading Com	3	1	33.3%	2	66.7%	2	100.0%	0	.0%
Consumer Product Safety Com	3	1	33.3%	2	66.7%	2	100.0%	0	.0%
Corp for National & Community Service	3	0	.0%	3	100.0%	0	.0%	3	100.0%
Gov of the District of Columbia	3	3	100.0%	0	.0%	0	.0%	0	.0%
Merit Systems Protection Bd	3	1	33.3%	2	66.7%	2	100.0%	0	.0%
NARA	3	1	33.3%	2	66.7%	2	100.0%	0	.0%
National Transportation Safety Bd	3	2	66.7%	1	33.3%	1	100.0%	0	.0%
Adm Office of US Courts	2	2	100.0%	0	.0%	0	.0%	0	.0%
Broadcasting Board of Governors	2	1	50.0%	1	50.0%	1	100.0%	0	.0%
Federal Mediation & Conciliation Serv	2	0	.0%	2	100.0%	1	50.0%	1	50.0%
Security & Exchange Com	2	2	100.0%	0	.0%	0	.0%	0	.0%
Selective Service Sys	2	1	50.0%	1	50.0%	1	100.0%	0	.0%
US Com on Civil Rights	2	1	50.0%	1	50.0%	1	100.0%	0	.0%
African Development Foundation	1	0	.0%	1	100.0%	1	100.0%	0	.0%
Armed Forces Retirement Home	1	1	100.0%	0	.0%	0	.0%	0	.0%
Export/Import Bank of US	1	1	100.0%	0	.0%	0	.0%	0	.0%
Fed Housing Finance Bd	1	1	100.0%	0	.0%	0	.0%	0	.0%
Inter American Foundation	1	0	.0%	1	100.0%	1	100.0%	0	.0%
Pension Benefit Guaranty Corp	1	0	.0%	1	100.0%	1	100.0%	0	.0%
RR Retirement Bd	1	1	100.0%	0	.0%	0	.0%	0	.0%
Soldiers' & Airmen's Home	1	1	100.0%	0	.0%	0	.0%	0	.0%
TOTAL	6378	3377	52.9%	3001	47.1%	1629	54.3%	1372	45.7%

* Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

¹ Percentages in columns "Dismissed" and "Not Dismissed" are of "Decided."

² Percentages in columns "Settled" and "Adjudicated" are of "Not Dismissed."

APPEALS ADJUDICATED* IN FY 2002 BY AGENCY

	Adjudicated		Affirmed		Reversed		Mitigated Modified		Other	
US Postal Service	178	127	71.3%	42	23.6%	9	5.1%	0	.0%	
Office, Personnel Mgmt.	637	444	69.7%	182	28.6%	3	.5%	8	1.3%	
Veterans Affairs	78	58	74.4%	18	23.1%	2	2.6%	0	.0%	
Justice	64	53	82.8%	5	7.8%	6	9.4%	0	.0%	
Navy	57	46	80.7%	9	15.8%	2	3.5%	0	.0%	
Treasury	56	48	85.7%	5	8.9%	2	3.6%	1	1.8%	
Army	65	59	90.8%	5	7.7%	1	1.5%	0	.0%	
Defense	45	38	84.4%	3	6.7%	4	8.9%	0	.0%	
Air Force	39	29	74.4%	3	7.7%	7	17.9%	0	.0%	
Agriculture	12	11	91.7%	1	8.3%	0	.0%	0	.0%	
Interior	35	28	80.0%	5	14.3%	1	2.9%	1	2.9%	
Transportation	25	16	64.0%	9	36.0%	0	.0%	0	.0%	
Health & Human Serv	22	14	63.6%	8	36.4%	0	.0%	0	.0%	
General Service Adm	12	11	91.7%	0	.0%	1	8.3%	0	.0%	
Social Security Adm	7	5	71.4%	2	28.6%	0	.0%	0	.0%	
Commerce	8	6	75.0%	2	25.0%	0	.0%	0	.0%	
Labor	4	4	100.0%	0	.0%	0	.0%	0	.0%	
Housing & Urban Dev	2	1	50.0%	1	50.0%	0	.0%	0	.0%	
Energy	3	3	100.0%	0	.0%	0	.0%	0	.0%	
NASA	2	2	100.0%	0	.0%	0	.0%	0	.0%	
Smithsonian Inst	2	2	100.0%	0	.0%	0	.0%	0	.0%	
Education	1	0	.0%	1	100.0%	0	.0%	0	.0%	
FDIC	1	1	100.0%	0	.0%	0	.0%	0	.0%	
EEOC	1	1	100.0%	0	.0%	0	.0%	0	.0%	
TVA	4	4	100.0%	0	.0%	0	.0%	0	.0%	
State	1	1	100.0%	0	.0%	0	.0%	0	.0%	
FCC	1	1	100.0%	0	.0%	0	.0%	0	.0%	
GPO	1	1	100.0%	0	.0%	0	.0%	0	.0%	
EPA	1	0	.0%	1	100.0%	0	.0%	0	.0%	
National Credit Union Adm	1	0	.0%	1	100.0%	0	.0%	0	.0%	
Nuclear Regulatory Com	1	1	100.0%	0	.0%	0	.0%	0	.0%	
Boundary & Water Com: US/MEX	2	2	100.0%	0	.0%	0	.0%	0	.0%	
Corp for National & Community Service	3	3	100.0%	0	.0%	0	.0%	0	.0%	
Fed Mediation & Conciliation Service	1	1	100.0%	0	.0%	0	.0%	0	.0%	
TOTAL	1372	1021	74.4%	303	22.1%	38	2.8%	10	.7%	

Percentages may not add to 100% due to rounding.

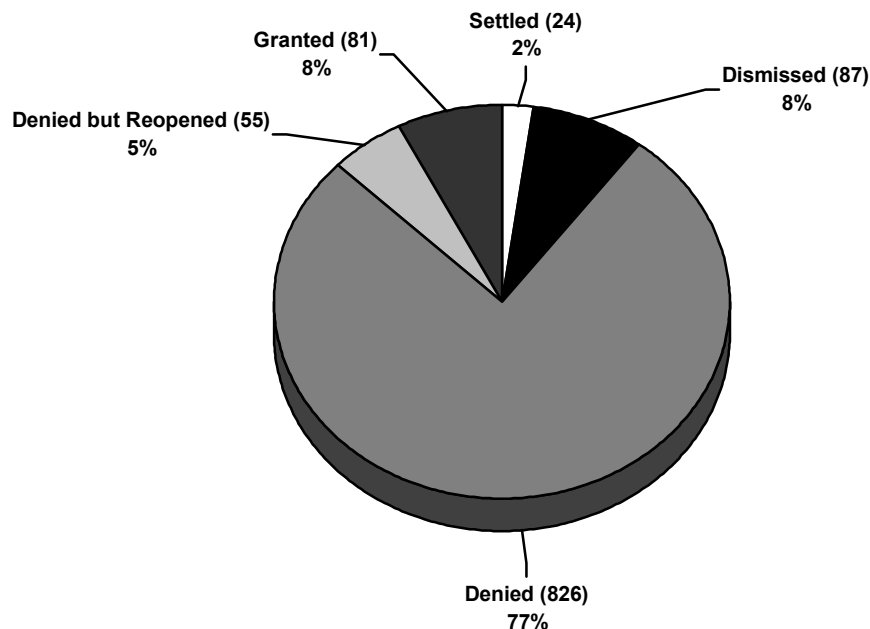
* ADJUDICATED means adjudicated on the merits, i.e., not dismissed or settled.

Headquarters Decisions

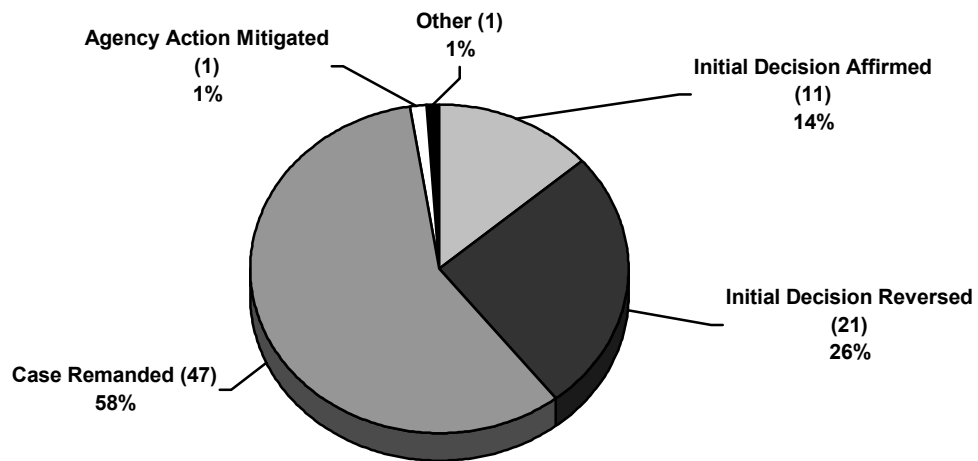
**DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS
DECIDED IN FY 2002 BY TYPE OF CASE**

Type of Case	Decided	Dismissed		Settled		Denied		Denied Reopened		Granted	
Adverse Action by Agency	465	45	9.7%	8	1.7%	358	77.0%	17	3.7%	37	8.0%
Termination of Probationers	63	3	4.8%	3	4.8%	56	88.9%	0	.0%	1	1.6%
Reduction in Force	27	3	11.1%	0	.0%	21	77.8%	3	11.1%	0	.0%
Performance (Ch. 43)	9	1	11.1%	0	.0%	6	66.7%	0	.0	2	22.2%
Acceptable Level of Competence (WIGI)	6	1	16.7%	1	16.7%	4	66.7%	0	.0%	0	.0%
Suitability	18	2	11.1%	0	.0%	13	72.2%	2	11.1%	1	5.6%
CSRS Retirement: Legal	130	10	7.7%	1	.8%	106	81.5%	4	3.1%	9	6.9%
CSRS Retirement: Disability	40	6	15.0%	0	.0%	28	70.0%	2	5.0%	4	10.0%
CSRS Retirement: Overpayment	12	0	.0%	1	8.3%	9	75.0%	2	16.7%	0	.0%
FERS Retirement	106	6	5.7%	3	2.8%	82	77.4%	3	2.8%	12	11.3%
FERCCA	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Individual Right of Action	67	3	4.5%	1	1.5%	47	70.2%	9	13.4%	7	10.5%
Other	129	7	5.4%	6	4.6%	95	73.6%	13	10.1%	8	6.2%
Total	1073	87	8.1%	24	2.2%	826	77.0%	55	5.1%	81	7.6%

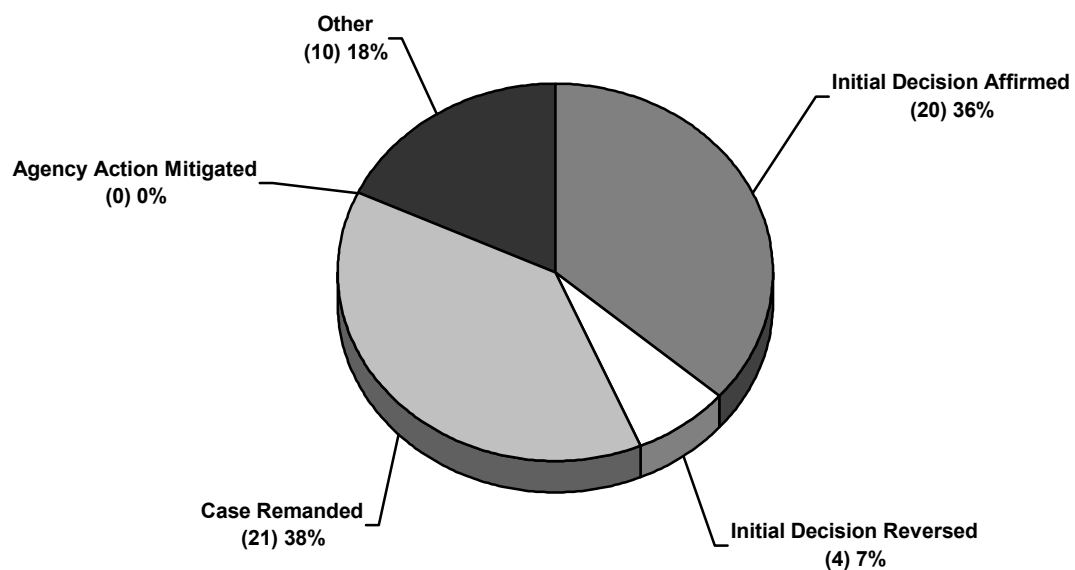
**DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON
APPEALS DECIDED IN FY 2002**



Total Number of Petitions for Review: 1,073

**DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON
APPEALS GRANTED IN FY 2002**

Based on 81 Petitions for Review Granted

**DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON
APPEALS DENIED BUT REOPENED IN FY 2002**

Based on 55 Petitions for Review Denied But Reopened
(Percentages do not total 100% because of rounding)

PETITIONS FOR REVIEW DECIDED IN FY 2002 BY AGENCY

	Decided	Dismissed		Settled		Denied		Denied Reopened		Granted	
Office, Personnel Mgmt*	285	22	7.7%	5	1.8%	228	80.0%	11	3.9%	19	6.7%
US Postal Service	211	18	8.5%	3	1.4%	166	78.7%	5	2.4%	19	9.0%
Army	87	9	10.3%	0	.0%	73	83.9%	2	2.3%	3	3.4%
Veterans Affairs	78	5	6.4%	0	.0%	60	76.9%	5	6.4%	8	10.3%
Navy	64	3	4.7%	1	1.6%	46	71.9%	4	6.2%	10	15.6%
Justice	62	5	8.1%	6	9.7%	41	66.1%	6	9.7%	4	6.4%
Treasury	48	2	4.2%	1	2.1%	39	81.2%	1	2.1%	5	10.4%
Air Force	43	6	14.0%	4	9.3%	25	58.1%	4	9.3%	4	9.3%
Agriculture	38	3	7.9%	1	2.6%	27	71.0%	6	15.8%	1	2.6%
Defense	30	2	6.7%	0	.0%	24	80.0%	1	3.3%	3	10.0%
Transportation	24	4	16.7%	0	.0%	16	66.7%	3	12.5%	1	4.2%
Interior	20	3	15.0%	1	5.0%	14	70.0%	0	.0%	2	10.0%
Social Security Adm	13	1	7.7%	0	.0%	10	76.9%	2	15.4%	0	.0%
Labor	10	0	.0%	0	.0%	9	90.0%	1	10.0%	0	.0%
Health & Human Serv	8	0	.0%	1	12.5%	6	75.0%	1	12.5%	0	.0%
General Service Adm	7	0	.0%	0	.0%	7	100.0%	0	.0%	0	.0%
Smithsonian Inst	5	1	20.0%	0	.0%	4	80.0%	0	.0%	0	.0%
Commerce	4	0	.0%	0	.0%	4	100.0%	0	.0%	0	.0%
Housing & Urban Dev	4	0	.0%	0	.0%	4	100.0%	0	.0%	0	.0%
Government of the DC	4	0	.0%	0	.0%	4	100.0%	0	.0%	0	.0%
NASA	4	0	.0%	1	25.0%	3	75.0%	0	.0%	0	.0%
EEOC	3	0	.0%	0	.0%	2	66.7%	1	33.3%	0	.0%
Court Serv & Offend Super Agency for DC	2	0	.0%	0	.0%	2	100.0%	0	.0%	0	.0%
FCC	2	0	.0%	0	.0%	2	100.0%	0	.0%	0	.0%

PETITIONS FOR REVIEW DECIDED IN FY 2002 BY AGENCY
(continued)

	Decided	Dismissed		Settled		Denied		Denied Reopened		Granted	
FEMA	2	0	.0%	0	.0%	2	100.0%	0	.0%	0	.0%
Broadcasting Board of Governors	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Chemical Safety Hazard Investigation Bd	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Education	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Energy	1	0	.0%	0	.0%	0	.0%	1	100.0%	0	.0%
EPA	1	0	.0%	0	.0%	0	.0%	0	.0%	1	100.0%
Farm Credit Adm	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Federal Election Com	1	0	.0%	0	.0%	0	.0%	0	.0%	1	100.0%
Federal Housing Finance Bd	1	1	100.0%	0	.0%	0	.0%	0	.0%	0	.0%
Merit Systems Protection Bd	1	1	100.0%	0	.0%	0	.0%	0	.0%	0	.0%
NARA	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Nuclear Regulatory Com	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Other	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
Selective Service Sys	1	0	.0%	0	.0%	0	.0%	1	100.0%	0	.0%
TVA	1	1	100.0%	0	.0%	0	.0%	0	.0%	0	.0%
US International Development Agency	1	0	.0%	0	.0%	1	100.0%	0	.0%	0	.0%
TOTAL	1073	87	8.1%	24	2.2%	826	77.0%	55	5.1%	81	7.6%
Percentages may not add to 100 due to rounding.											

* Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Summaries of Merit Systems Studies Issued in 2002

The U.S. Office of Personnel Management in Retrospect: Achievements and Challenges After Twenty Years

This retrospective report, based on two decades of MSPB observation and oversight, addressed the overall performance of the Office of Personnel Management (OPM) rather than the results of each of the agency's programs and activities. The report cited the agency's achievements but focused in particular on issues that cause concern or deserve continuing scrutiny. Overall, the Board found that OPM's performance has been marked by many successes, but that a number of programs need attention.

OPM has succeeded in achieving the Civil Service Reform Act's vision of a decentralized civil service, improved human resources oversight, and the fostering of a diverse and family-friendly workplace. However, OPM needs to strengthen its leadership in areas such as compensation and staffing. The Government's classification and compensation systems have long been deemed antiquated and inapplicable to today's work and workers. Similarly, staffing Federal jobs remains a problem from the perspective of both supervisors and the candidates who might be interested in public service. For example, the Government has policies and practices that conflict with or detract from a merit-based employment system. One of these, the Rule of Three, is based on law originally established over 100 years ago and, for decades, has been cited by Federal managers as an impediment to efficient, effective hiring. The Board first

recommended in 1994 that the Rule of Three be abolished, and has continued to advocate this position.

The Board also found use of the noncompetitive Outstanding Scholar hiring authority to be problematic. While the authority makes it easy for managers to hire candidates with a 3.5 grade point average, it removes from consideration those who may have all the right qualities for the job but do not have the required academic standing. African-Americans and Hispanics, who are supposed to be the beneficiaries of this program, are just as likely, if not more likely, to be hired using merit-based hiring methods rather than this noncompetitive authority. On several occasions, OPM warned agencies not to misuse this hiring authority, but did not take action to terminate the authority, even though it is no longer necessary to ensure appropriate representation of African-Americans and Hispanics in the workforce.

The report also points out that OPM has not adequately championed the development and use of the best candidate assessment tools possible, except on a reimbursable basis, which is not helpful to some resource-strapped agencies. In addition, while OPM has devoted many resources over the years to the development of assessment tools, including tests of cognitive ability, the agency has not actively encouraged agencies to use cognitive testing. This kind of testing is one of the better predictors of future job performance, and OPM has not been an active advocate for its use.

There are multiple reasons for OPM's lack of vigorous leadership in eliminating these problems. Insufficient resources is a chronic problem. A massive systemic overhaul, such as is needed for the Federal compensation system, may require a sizable investment. There may be a temptation to allocate scarce resources to projects in which the objectives are more easily achieved, and leave other, more problematic, undertakings for another time.

*The Federal Merit Promotion Program:
Process vs. Outcome*

This study of the Federal merit promotion program was based on a survey of supervisors, employees, and union representatives. The Board reported that the merit promotion procedures used to fill vacancies in Federal agencies generally result in decisions that conform with the merit principle that requires decisions on employee advancement to be made solely on the basis of relative ability, knowledge, and skills, after fair and open competition which ensures that all receive equal opportunity. The study also determined, however, that there are problems associated with the Federal merit promotion process—among them, that it is resource intensive and time consuming.

Although the vast majority of the supervisors participating in the study were satisfied with the individuals they selected to fill vacancies using the merit promotion process, they were not positive about all aspects of the merit promotion process. They expressed two basic concerns—the merit promotion process, on at least some occasions, was seen as adding little of value in helping identify the best qualified candidate for promotion, and the process

took too long and was often too resource intensive.

In general, most employees also agreed with the supervisors that the entire process takes far too long. Although members of both groups may have been unrealistic in their beliefs concerning how quickly a vacancy can be filled, the Board's research revealed that they have reason to be concerned about the time it can take to accomplish some of the administrative activities that support the merit promotion process. At the same time, the reductions in human resources staffs that have occurred in many organizations may make it difficult to greatly improve operations unless there are some significant changes made in the merit promotion process itself.

Both employees and union representatives were also concerned about the bases on which supervisors make promotion decisions. In particular, many employees believed they and other people in their organizations had been unfairly passed over for promotions because the selecting official had already made a decision before the vacancy was announced. Further, many employees and union representatives said those decisions were not always based on merit but instead took into consideration non-merit factors such as loyalty to the supervisor and connections to other important people in the Government. Not surprisingly, supervisors typically disagreed with this assessment.

Among the report's recommendations were that Federal employers develop valid new approaches to assessing applicants for jobs, including those involving merit promotions; share information widely among employees about the number of

anticipated promotion opportunities and the criteria to be applied in selecting from among applicants for those opportunities; improve processing of merit promotion action tasks by servicing personnel offices; and explore the expansion of merit-based but noncompetitive alternatives to some actions currently taken under competitive merit promotion procedures.

Assessing Federal Job-Seekers in a Delegated Examining Environment

In this report, the Board found that employee selection processes vary widely among Federal agencies and do an uneven job of predicting how well candidates are likely to perform. The report noted that the ability of commonly used assessment tools to predict future job performance varies widely, and that one of the tools agencies most often use—rating candidates' training and experience—can be one of the least predictive.

Federal departments and agencies operate almost 700 delegated examining units (DEUs) that assess job applicants. Although the Office of Personnel Management (OPM) establishes standards for the operation of DEUs and periodically reviews their operations, DEUs operate with substantial independence. Agencies most often assess job applicants through reviewing their training and experience, followed by interviewing them and conducting reference checks. One MSPB concern is that some agencies view the assessment

process as a cost rather than an investment and find minimal assessment acceptable. Another concern is a lack of expertise among agencies in candidate assessment, raising the likelihood that some agency assessment processes may appear to be reasonable but actually do a poor job of predicting future performance. The report also noted, however, that some agencies have taken a strategic view of candidate assessment, are using very good assessment processes, and have documented tangible benefits for this investment.

The report recommended that OPM increase its efforts to develop valid candidate assessment tools and make them available to agencies. It further recommended that OPM pay greater attention to addressing the costs of developing assessment tools so that cost alone does not prevent DEUs from having access to the best tools available. Among the report's recommendations to agencies were that they take a strategic view of candidate assessment and that they emphasize the importance of making effective use of the probationary period for new hires.

*Making the Public Service Work:
Recommendations for Change*

This report to the National Commission on the Public Service (Volcker Commission) is discussed in the section of this report titled "Fiscal Year 2002 in Review."

Fiscal Year 2002 Financial Summary

(dollars in thousands)

FINANCIAL SOURCES

Appropriations	\$30,533
Civil Service Retirement and Disability Trust Fund	2,520
Reimbursements	9

Total Revenue	\$33,062
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OBLIGATIONS INCURRED

Personnel Compensation	\$20,577
Personnel Benefits	4,265
Benefits, Former Employees	19
Travel of Persons	541
Transportation of Things	73
Rental Payments	2,832
Communications, Utilities, and Miscellaneous Charges	693
Printing and Reproduction	81
Other Services	2,947
Supplies and Materials	375
Equipment	622

Total Obligations Incurred	\$33,025
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OBLIGATED BALANCE	\$37
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For Additional Information

The MSPB website contains information about the Board and its functions, where to file an appeal, and how the Board's adjudicatory process works.

At the website, you can get Board regulations, appeal and PFR forms, important telephone and FAX numbers, and e-mail addresses for the headquarters, regional, and field offices.

Complete decisions from July 1, 1994, and significant precedential decisions issued from 1979 to 1994 are available for downloading. The website also provides weekly Case Summaries—an easy way to keep up with changes in Board case law.

From the website, you can download recent Board reports and special studies on civil service issues.

You can also subscribe to one of two list servers (listservs) on the website—one to receive Board decisions as they are posted, and the other to receive notification when a merit systems studies report is issued.

The Board's website is
<http://www.mspb.gov>.

The Board's toll-free telephone
number is **1-800-209-8960**.

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